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No. 513

In the

Supreme Court of the United States

OCTOBER TERM 1968

CORNELIA O'CONNOR GREY, JAMES CHARLES GREY and MICHAEL CARTER GREY,

Petitioners,

v.

FIRST NATIONAL BANK IN DALLAS, ET AL.,

Respondents.

BRIEF OF FIRST NATIONAL BANK IN DALLAS, TRUSTEE OF THE IVOR O'CONNOR MORGAN TRUST, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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First National Bank in Dallas, Trustee of the Ivor O'Connor Morgan Trust, one of the Respondents, files its Brief in Opposition to the Petition for Writ of Certiorari, filed herein by the Petitioners, Cornelia O'Connor Grey, James C. Grey and Michael C. Grey.

OPINIONS BELOW

The statement of the Opinions Below set forth in the Petition of Writ of Certiorari is correct except that the trial was before the United States District Court for the *Northern* District of Texas, Dallas Division (Hon.

Sarah T. Hughes) and not the *Southern* District as stated.

JURISDICTION

The jurisdiction of the Supreme Court of the United States under Title 28, U.S.C., Sec. 1254(1) is admitted.

QUESTIONS PRESENTED

Question 1 (Petition Pages 2 and 3) does *not* fairly state the point in that it fails to show that the trial court did charge the jury on the issue of the Bank's failure to disclose in that the charge stated "it is the contention of Plaintiffs that the Bank as Agent and Trustee violated its fiduciary duties * * * and that the First National Bank denies that it misrepresented or concealed any material facts, contending on the other hand that it made a full disclosure of all material facts," and further stated that "there must be fair dealing and good faith by the Trustee toward the beneficiary" and that the "Trustee * * * has a duty to impart to the beneficiary all material facts in dealings between the Trustee and the beneficiary." The complete charge to the jury on this point is as follows:

> "You are further instructed that the relationship of principal and agent is fiduciary in nature and therefore the agent is required to be loyal and to act in good faith. The Agent must be fair and honest in all the dealings with his principal, and the Agent has the duty of imparting to his principal, every material fact relating to a transaction, if in the scope of the agency, on becoming aware of such facts during the course of the transaction.

"The First National Bank, in addition to being the agent of Mrs. Grey, was the Trustee of the O'Connor Trust, of which Mrs. Grey was the beneficiary, and James C. and Michael C. Grey were the Remaindermen-beneficiaries.

* * *

"You are instructed that the Trustee of a Trust occupies the position of a fiduciary of the Trust, that is, there must be fair dealing and good faith by the Trustee toward the beneficiary. The Trustee has the duty to act in the best interests of the beneficiary of the Trust, and has a duty to impart to the beneficiary all material facts in dealings between the Trustee and the beneficiary." (IR 294-295)

Question 2 (Petition Page 3) does not fairly state the point in that it fails to show that the trial court charged that "the Trustee of a Trust occupies the position of a fiduciary of the Trust that there must be fair dealing and good faith by the Trustee toward the beneficiary. The Trustee has the duty to act in the best interests of the beneficiary of the Trust, and has a duty to impart to the beneficiary all material facts in dealings between the Trustee and the beneficiary." (IR 295)

Question 5 (Petition Page 4) in stating that "such beneficiaries did not authorize such attorney to appear on their behalf * * *" is merely a conclusion and wholly disregards the trial court's instructions on express, implied and apparent authority as applied to the relationship of principal and agent, and on which the jury's answers to special issue Number 1 were based that Philip Kelton was authorized to represent both

James C. Grey and Michael C. Grey in the state court proceeding. Furthermore, due process under the 15th Amendment does not necessarily require personal service of process on a person in such circumstances to bind his interests as a beneficiary of a trust.

STATEMENT

Petitioner's Statement is extremely distorted and argumentative and rather than attempting to point out the distortions and in the interest of brevity, we respectfully refer this Honorable Court to the detailed statement of the evidence by the Court of Appeals. (393 F. 2d 374-379)

REASONS FOR REFUSING THE WRIT

General Reasons

The Petition for Writ of Certiorari clearly fails to present grounds for review under Rule 19 of Rules of the Supreme Court. It does not present "a federal question of substance not theretofore determined by this court", nor "a decision in conflict with another court of appeals on the same matter," nor on an "important state question * * * in conflict with applicable state law," nor a decision on "an important question of federal law which has not been * * * settled by this court," nor a decision on "a federal question in a way in conflict with applicable decisions of this Court," nor a decision which "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

The five reasons stated in the Petition are based primarily on procedural matters on which the decision of the Court of Appeals is final under the federal judicial court structure. This Court does not concern itself with particular issues of justice between individual litigations as distinguished from the general public with its interests of broad scope and range. In *Layne & Bowler Corporation v. Western Well Works* (261 U. S. 387 at 393, 67 L.Ed. 712 at 714) this Court stated:

> ". . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."

This Court does not exercise its discretionary powers to issue writs of certiorari to correct alleged errors in lower court decisions in such circumstances, nor "give the defeated party in the circuit court of appeals another hearing." *(Magnum Import Company v. Coty*, 262 U. S. 159 at 163, 67 L.Ed. 922 at 924)

A question of importance merely to the litigants and which does not present an issue of public significance does not come within the standards governing the exercise of the Supreme Court's exercise of discretionary power of review by writ of certiorari. The Court in construing Rule 19 in the case of *Rice v. Sioux City Cemetery* (349 U. S. 70 at 73, 99 L.Ed. 897 at 901) stated:

> "This Rule, formulated 30 years ago, embodies the criteria, developed ever since the Evarts Act

of 1891, by which the Court determines whether a particular case merits consideration, with due regard to the proper functioning of the limited reviewing power to which this Court is confined, decisively restricted through the creation of the intermediate Courts of Appeals and more largely confined by the Judiciary Act of 1925. * * *

* * *

"A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. (*Magnum Import Co. v. Coty*, 262 U. S. 159, 163, 67 L. Ed. 922, 924, 43 S. Ct. 531; see also Address of Mr. Chief Justice Vinson, before the American Bar Association, Sept. 7, 1949, 69 Sup. Ct. v, vi; Address of Mr. Chief Justice Hughes, before the American Law Institute, May 10, 1934, XI Proc Am Law Inst 313.) 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. * * *"

Reply to Petitioners' Reason 1

Petitioners' statements in footnote 8 on page 19 of Petition for Writ of Certiorari that "the record of the State Court hearing is clear that Mrs. Grey and James were prevented by the Bank's failure to disclose facts bearing upon the proposed purchase by it of trust property * * * These facts constituted extrinsic fraud invalidating a judgment * * * constituted fraud upon the state court itself" are not supported by the record. In fact, these same grounds were the basis for one of Petitioners' specifications of error in the Court of Appeals

as reversible error in overruling their motions for directed verdict or for judgment n.o.v. and which specification was expressly denied with the statement "We do not agree." (393 F. 2d 371 at 379 II)

Petitioners' contention that one of the instructions to the jury that Mrs. Grey was bound by the State Court and that James and Michael were likewise bound unless the jury found that they had not authorized Kelton to represent them was tantamount to instructing a verdict for the Bank on the issues of fraud is without merit because the court's charge, taken as a whole, made it clear that the fraud issue related not only to the Partition and Sale Agreement, but also to the entry of the State Court judgment.

The trial court specifically instructed the jury as follows:

> "The issues in this case for your decision are: (1) Whether the First National Bank in its individual capacity misrepresented or concealed material facts which were relied on to the damage of Plaintiffs (2) whether the partition and sale agreement was later ratified by Mrs. Grey, Michael or James Grey with full knowledge of the facts and their legal rights (3) whether Mr. Kelton was authorized to represent James and Michael Grey in the State Court case, and (4) whether James and Michael Grey consented to the entry of judgment in the State Court." (IR, page 292)

The jury specifically answered that Kelton was authorized to represent both James and Michael in the State Court (IR, page 297) and that there was no conceal-

ment or misrepresentation by the Bank to either Mrs. Grey, James or Michael in the Partition and Sale Agreement or the entry of the State Court judgment. (IR, pages 297 and 298)

There is no basis for Petitioners' contention that the jury might have believed that if they answered "yes" as to Kelton's authority, they were bound to answer "no" as to fraud. (393 F. 2d 371 at 382)

The Court of Appeals' decision is not in conflict with the case of *Callen v. Pennsylvania Railroad Company* on this point. The generally accepted rule is that the Supreme Court will not grant certiorari merely to review questions of evidence or fact *(United States v. Johnston* 268 U. S. 220 at 227, 69 L.Ed. 925 at 926). However, recent cases under the Federal Employers' Liability Act have provided a highly argumentative exception to the general rule based upon the rationale that it is not a mere review of the evidence but the importance of the right of trial by jury as specifically provided by the Act *(Rogers v. Missouri Pacific Railroad Company* 352 U. S. 500, 1 L.Ed(2) 493). Clearly, these cases are not representative of the normal certiorari practice and occupy a position of exceptional standing for review. As pointed out in the dissenting opinion by Justice Frankfurter in the *Rogers* case (supra), 352 U. S. 500 at 537, 1 L.Ed. 493 at 527: "In any event, the Court in these four cases has merely reviewed evidence that has already been reviewed by two lower Courts, and in so doing it ignores its own strictures to the bar

that 'We do not grant a certiorari to review evidence and discuss specific facts (authorities cited).'" One of the principal cases cited is *Houston Oil Company v. Goodrich* (245 U. S. 440, 62 L.Ed. 385), which held that the refusal of the trial court, upheld by the Circuit Court of Appeals, to submit certain questions to the jury, will not sustain a writ of certiorari by the Supreme Court where "the propriety of submitting these matters depended essentially upon an appreciation of the evidence."

Reply to Petitioners' Reason 2

Petitioners' contention that trial court's failure to submit special issue, as to trustee's alleged failure to disclose material facts to the beneficiaries, as a basis for writ of certiorari is without merit. The instructions to the jury that it was the contention of Petitioners (Plaintiffs in trial court) "that the Bank as Agent and Trustee violated its fiduciary duties in negotiations leading to the agreement and to the state court judgment" (IR 291), that the Bank "denies that it misrepresented or concealed any material facts, contending on the other hand, that it made a full disclosure of all material facts" (IR 291), that the fiduciary relationship between principal and agent includes "the duty of imparting to his principal every material fact relating to a transaction, if in the scope of the agency, on becoming aware of such facts during the course of the transaction" (IR 294), that the Trustee "has the duty to act in the best inter-

ests of the beneficiary of the Trust, and has the duty to impart to the beneficiary all material facts in dealings between the Trustee and the beneficiary" (IR 295), and that "with respect to what knowledge a Bank as Agent or Trustee has that it would be obligated to disclose to its principal or the beneficiaries of the Trust, if material to a self-dealing transaction, you are instructed that a Bank can only act through its officers and agents, and consequently knowledge acquired by an officer or agent of the Bank is considered to have been known by the Bank so as to be covered by the duty to disclose" (IR 295) clearly encompassed any connotation of bad faith or negative silence; and when considered in the light of the jury answers to special issues 2 and 3, which were answered in the negative individually as to each of the Petitioners, completely refute the alleged error asserted by Petitioners on this point.

When a case is submitted on special verdicts under Rule 49(a), the court should give the jury only such instructions as it deems necessary to enable the jury to make intelligent findings upon the issues submitted. *(Cate v. Good Bros.* 181 F. 2d 146 at 149). As stated by the Court of Appeals in this cause, 393 F.2d 371 at 381 the charge "must be viewed as a whole, in connection with the contentions aired by the parties in the Court below, and it must be viewed from the standpoint of the jury. *Garrett v. Campbell* 360 F. 2d 382 at 386."

Attention is further directed that in said *Garrett* case the court further stated "even if a portion of the charge is technically imperfect if the charge in general correctly instructs, then no harmful error has been committed. * * *" Again, in the case of *Messer v. Foster* 245 F. 2d 412 at 414, it was held that failure to charge expressly in terms of a requested instruction, which was correct as a matter of substantive law, could not be deemed error if the charge as given otherwise adequately instructed the jury on the controlling principles.

Furthermore, there is no conflict between the Court of Appeals' decision and the cases cited in Petitioners' petition herein, because in both the case of *Tilman v. Great American Indemnity Co.* and the case of *Mickey v. Tremco Mfg. Co.*, the general rule is specifically recognized that the trial court has wide discretion as to the form and contents of questions to be submitted and should, especially when requested to do so, submit questions covering all issues raised by the pleadings. The trial court's charge, approved by the Court of Appeals, is not in conflict with the holdings in these cases.

Reply to Petitioners' Reason 3

The trial court's response to the jury's inquiry was proper in view of the circumstances in this case, and it could not be placed in the position of acting as a 13th juror as pointed out by the Court of Appeals.

The court in a recent Texas case *(Aetna Casualty and Surety Company v. Scott* 423 SW 2d 351 at 354, no writ history) in passing on this question stated: "By the very nature of the situation * * * the trial judge is required to exercise judgment and discretion. * * * The statement of facts in this case has more than 100 pages of medical testimony from five doctors. It, of course, had not been reduced to writing at the time the request was made and the task of selecting the portion relevant to the inquiry was not an easy one. Under such circumstances the judge must be given broad discretion and his action held erroneous only where there is an abuse of that discretion with resulting harmful effects." See also: *Standard Supply & Hardware Co. v. Christian-Carpenter Drilling Co.* 183 SW 2d 657 at 663 error refused. These cases should be followed under the doctrine of *Erie Railroad v. Tomkins, 304 U. S. 64, 82 L.Ed. 1118.*

Reply to Petitioners' Reason 4

The insolence and impertinence of the statements made on behalf of Petitioners would justify their being stricken, and they certainly do not warrant the dignity of a reply.

Reply to Petitioners' Reason 5

Petitioners' contention that due process requirements of the 14th Amendment were violated as to James and Michael by reason of their being represented in the State Court proceeding by Kelton is not supportable.

The court's instructions fully apprised the jury of the contentions of the parties as to the authority of Kelton to represent James and Michael (IR 291 and 292) and as to express, implied and apparent authority (IR 293). The jury in answer to Special Issue Number 1 specifically answered "he was authorized" to represent each of them (IR 297) and there is sufficient evidence in the record to support the jury's conclusions as summarized in the opinion of the Court of Appeals (393 F. 2d 371 at 385).

Furthermore, James and Michael had each signed the Partition and Sale Agreement which, according to its terms, was conditioned upon the entering of a judgment in a proceeding to be commenced as soon as possible (IR 114 and 115). This Agreement was sufficient to comply with the notice requirements of Article 7425b-24 of the Revised Civil Statutes of Texas (Texas Trust Act) and Rule 121 of Texas Rules of Civil Procedure as to due process.

The case principally relied upon by Petitioners on this point (*Armstrong v. Manzo* 380 U. S. 545, 14 L.Ed. (2) 62) is clearly distinguishable from the case here under consideration in that as stated in that opinion (380 U. S. 545 at 548, 14 L.Ed(2) 62 at 64), "no notice of any kind was given to the Petitioner of the filing or pendency of this adoption proceeding" and the Court further points out that "Texas law provides that an adoption such as this one shall not be permitted without the written consent of the child's natural father" (380

U. S. 545 at 546, 14 L.Ed. (2) 62 at 63). Where the written consent is executed and filed in the case the non-adopting parent "has all the notice of the adoption proceeding which the law required." *(Pettit v. Engelking* 279 SW 2d 489 at 491 and authorities therein cited).

The jury verdict that Kelton had authority to represent James and Michael in the State Court proceeding is supported by the evidence, and his answer on their behalf was sufficient to dispense with the necessity for issuance and service of any notice upon them.

CONCLUSION

Essentially, Petitioners claim that the values of the properties disclosed to the State Court were false, and that they thereby did not receive a fair price for their property. Of course, these allegations are precisely the same issues which were determined in the State Court judgment after a full day's hearing. Furthermore, Petitioners attempted to re-litigate precisely these same questions in the trial court in this action and this was the basis of the Court of Appeals' ruling herein that the State Court judgment could not be set aside by collateral attack in the Federal Court. *(United States v. Throckmorton* 98 U. S. 61, 25 L.Ed 93) In *Yount-Lee Oil Co. v. Federal Crude Oil Co.* 92 SW 2d 493 (Tex. Civ. App. 1936), the court held on this question that if the complainant "is unable to overcome the effect upon the Court or jury of the evidence offered by his adversary, he cannot, in effect, obtain a retrial of the issue before

another tribunal by charging that the judgment against him was procured by perjury, forgery or false testimony." This latter case holding was cited with approval in the case of *Elder v. Byrd-Frost, Inc.* 110 SW 2d 172 at 175 (Tex. Civ. App. 1937).

The trial court's ruling that no issues or rescission would be submitted to the jury was based upon two grounds; first, that it would be inequitable to do so; and second, that the Partition and Sale Agreement had been approved by a final judgment in the State Court proceeding (IIIR 1471). This ruling necessarily held that the fraud, alleged in connection with the judgment was intrinsic and not *extrinsic* as claimed by Petitioners. (Moore's Federal Practice Vol. 7, 631-635).

This case has been prosecuted on suppositions of fraud and concealment. The facts are that the $1,155,000.00 paid by the Bank was in excess of the reasonable market value of the property at the time, and the Partition and Sale Agreement was entered into after extended negotiations. The Attorney General of the State of Texas approved only after up-to-date appraisals were made by the Dallas Real Estate Board. The sale was consummated only after a full hearing and approval by a final judgment of the State Court. The judgment herein sought to be set aside was based upon a jury verdict after a three-week trial, and which judgment was affirmed by the Court of Appeals for the Fifth Circuit after a thorough review of the entire case.

The Petition for Writ of Certiorari is based primarily on alleged questions of Federal Civil Procedure which are *not* in conflict with decisions of other Courts of Appeals. It does *not* present "a federal question of substance not heretofore determined by this court," nor an "important state question * * * in conflict with applicable state law," nor "an important question of federal law which has not been * * * settled by this court," nor "a federal question in a way in conflict with applicable decisions of this court," nor a decision which "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision," and, therefore, it fails to present grounds for review under Rule 19.

The Petition should be refused.

Respectfully submitted,

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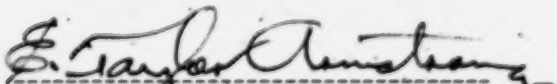

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Attorneys for Appellee, First National Bank in Dallas, Successor Trustee of the Ivor Elizabeth O'Connor Morgan Trust.

The foregoing Brief on behalf of Appellee First National Bank in Dallas as Successor Trustee of the Ivor O'Connor Morgan Trust (a charitable trust) is approved and adopted on behalf of Crawford C. Martin, Attorney General of the State of Texas.

Marvin H. Sentell,
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that copies hereof have been served by deposit in the United States Mail, First Class and Air Mail, postage prepaid as required under Rule 33, properly addressed to all counsel of record on this the 11th day of October, 1968.

E. Taylor Armstrong